

<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of this case.<sup>3</sup>

### **ISSUE**

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

### **FACTUAL HISTORY**

On August 28, 2015 appellant, then a 47-year-old nursing assistant, filed a traumatic injury claim (Form CA-1) alleging that she injured her back on that day when placing a sling under a patient while in the performance of duty. She stopped work on that same day and returned to restricted duty on September 4, 2015. On March 29, 2016 OWCP accepted the claim for other cervical disc displacement, unspecified cervical region, unspecified sprain of left shoulder joint, strain of unspecified muscle, fascia and tendon at shoulder and upper arm level, left arm; and strain of muscle and tendon of back wall of thorax.

In a report dated February 29, 2016, Dr. Jeffrey C. Hill, Board-certified in preventative medicine, noted that appellant had seen Dr. Andrew Porter, an osteopathic physician, who advised that appellant's level of disability secondary to pain seemed highly consistent with a disc herniation at C3-4. He indicated that appellant reported that her modified duties were more problematic because she could barely keep her head and neck in a supported position secondary to significant pain and perceived loss of strength. Dr. Hill described tenderness to palpation in the thoracic and cervical regions with decreased left shoulder and cervical spine range of motion. He indicated that appellant could not work, effective that day, because her pain was increasing and, due to work issues, she could not take the medication prescribed. Appellant stopped work that day.

On March 8, 2016 Dr. Hill provided a diagnosis of disc protrusion at C3-4 and opined that it was related to appellant's claim. He also noted that a pain management provider opined that appellant's cervical, thoracic, and shoulder issues were directly related to the disc pathology. Dr. Hill continued to advise that appellant could not work.

On April 15, 2016 appellant filed a claim for compensation (Form CA-7) for the period April 4 to 15, 2016.

By development letter dated May 23, 2016, OWCP informed appellant of the evidence needed to support her disability claim. It noted that the evidence of record did not contain a physician's well-rationalized opinion, based on examination findings and diagnostic tests/

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<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that following the June 29, 2018 decision, OWCP received additional evidence. However, the Board's Rules of Procedure provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

procedures, explaining why she was totally disabled from work in any capacity, including a sedentary, restricted-duty position. OWCP afforded appellant 30 days to submit additional evidence.

Appellant continued to submit claims for compensation (Form CA-7) for continuing dates of disability.

In a letter dated June 2, 2016, Dr. Hill explained that appellant reported that her pain increased at work, even though she was assigned light duty, and that her medications were making her “loopy.” He noted that she had seen pain management physicians and neurosurgeons who recommended conservative treatment including steroid injections. Dr. Hill recommended that, because appellant had loss of range of motion of the cervical spine and left shoulder and because her medications were having a deleterious impact on her cognitive functioning, she should remain off work until the efficacy of the steroid injections could be assessed. On June 15, 2016 he reported that she was incapable of working due to pain and the need for controlled substances for pain modulation.

By decision dated July 1, 2016, OWCP denied appellant’s claim for ongoing total disability for the period commencing February 29, 2016. It noted that appellant had filed CA-7 forms alleging disability beginning April 4, 2016, but that she had ceased work on February 29, 2016. OWCP found the evidence submitted was insufficient to establish that appellant was totally disabled from performing the duties of her limited-duty position.

Appellant, through her then representative,<sup>4</sup> requested reconsideration on August 3, 2016.

Evidence received subsequent to OWCP’s July 1, 2016 decision included a June 20, 2016 report indicating that Dr. Porter performed a cervical epidural steroid injection that day. In reports dated July 11, 2016, Dr. Hill indicated that the injections had not helped to reduce appellant’s pain or improve her functional status. He requested a repeat consultation with a neurosurgeon. On July 25, 2016 Dr. Hill indicated that he could offer some modified-duty options for appellant. He indicated that she could return to part-time modified work.

Appellant accepted a modified-duty position for four hours a day on August 8, 2016. Dr. Hill requested additional modification, but advised that she continue part-time modified duty.

On a December 19, 2016 form report Dr. Christian L. Bonasso, a Board-certified neurosurgeon, advised that appellant could return to work on January 2, 2017 with a 10-pound weight limit, for four hours daily for two weeks, then six hours daily for two weeks, then eight hours per day.

On December 22, 2016 Dr. Hill reported that appellant underwent cervical spinal surgery on November 22, 2016.<sup>5</sup> He advised that she could return to restricted duty on January 2, 2017. Appellant accepted a modified-duty position on January 3, 2017, within the restrictions provided

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<sup>4</sup> At that time appellant was represented by union personnel.

<sup>5</sup> The record contains no information regarding this surgical procedure, including pre- and post-operative care. The employing establishment noted that she was off work until January 2, 2017.

by Dr. Hill. On January 19, 2017 Dr. Hill noted that appellant reported that her cervical spine condition had improved since surgery, but that her left shoulder condition had worsened. He advised that she could increase her hours performing the modified position to six hours daily. Appellant began six hours of modified duty on January 27, 2017.

A January 27, 2017 MRI scan of the left shoulder demonstrated no rotator cuff, biceps, or labral tear.

On February 16, 2017 Dr. Hill noted that appellant continued to have profound loss of range of motion of the left shoulder which was “related to work activities.” He advised that she could resume full-time modified duty. Appellant began full-time modified duty on February 22, 2017.

In a February 27, 2017 report, Dr. Raul Raudales, Board-certified in family and sports medicine, noted seeing appellant regarding her left shoulder. He described physical examination findings and recommended medication, massage therapy, trigger pointing, and left shoulder injections.

On March 27 and April 21, 2017 Dr. Hill reiterated his findings and conclusions.

By decision dated May 3, 2017, OWCP denied modification of its prior decision. It found the medical evidence of record insufficient to establish that appellant was unable to continue her light-duty position commencing February 29, 2016.

On April 13, 2018 appellant, through counsel, requested reconsideration.

Evidence submitted subsequent to the May 3, 2017 OWCP decision included reports dated May 24, 2017 to May 10, 2018 in which Dr. Hill described appellant’s current medical management. Dr. Hill advised that her restrictions were permanent and that she could work full-time restricted duty.

OWCP also received a report wherein Dr. Raudales related that he had performed a left shoulder injection on June 19, 2017.

A March 29, 2018 MRI scan of the cervical spine demonstrated surgical changes at C3-4 and degenerative changes at C5-6 with new, moderate right neural foraminal narrowing at C5-6.

Appellant continued to work full-time modified duty within the restrictions provided by Dr. Hill.

By decision dated June 29, 2018, OWCP denied further merit review of appellant’s claim. It found the evidence submitted subsequent to its merit decision dated May 3, 2017 was insufficient to warrant merit review as the reports submitted were cumulative in nature and merely provided updates on appellant’s current condition and were also irrelevant because none of the reports discussed work capacity during appellant’s work stoppage beginning February 29, 2016.

### **LEGAL PRECEDENT**

Under section 8128(a) of FECA,<sup>6</sup> OWCP has the discretion to reopen a case for review on the merits. It must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(3) of the implementing federal regulations, which provides that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence which either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>7</sup>

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by OWCP without review of the merits of the claim.<sup>8</sup>

The Board has held that the submission of evidence or argument which repeats or duplicates evidence or arguments already in the case record, and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>9</sup>

### **ANALYSIS**

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

With her timely request for reconsideration, appellant has not shown that OWCP erroneously applied or interpreted a specific point of law, nor has she advanced a relevant legal argument not previously considered by OWCP. Consequently, appellant is not entitled to review of the merits of her claim on the first and second above-noted requirements under 20 C.F.R. § 10.606(b)(3).

Additionally, appellant has not submitted relevant and pertinent new evidence not previously considered by OWCP. The underlying issue in this case is whether she has submitted sufficient evidence to establish total disability for the period commencing February 29, 2016 until her return to full-time work on February 22, 2017. Because the underlying issue in this case is medical in nature, it must be addressed by relevant medical evidence.

In support of the April 13, 2018 reconsideration request, OWCP received reports from Dr. Hill dated from May 24, 2017 to May 10, 2018. These reports did not discuss appellant's work capacity during the period of disability claimed. Likewise, Dr. Raudales merely described a

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<sup>6</sup> 5 U.S.C. § 8128(a).

<sup>7</sup> 20 C.F.R. § 10.606(b)(3).

<sup>8</sup> *Id.* at § 10.608(b).

<sup>9</sup> *J.V.*, Docket No. 18-1534 (issued February 25, 2019).

June 19, 2017 left shoulder injection procedure, and the March 29, 2018 MRI scan of the cervical spine described the study's findings. The Board has held that the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>10</sup> Thus, appellant is also not entitled to a review of the merits of her claim based on the third above-noted requirement under section 10.606(b)(3).

The Board accordingly finds that appellant has not met any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

On appeal counsel contends that the June 29, 2018 OWCP decision is contrary to fact and law. As stated above, the evidence appellant submitted on reconsideration has not met the requirements to reopen her case for a review of the merits of the claim.

### **CONCLUSION**

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

### **ORDER**

**IT IS HEREBY ORDERED THAT** the June 29, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 2, 2019  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>10</sup> See *K.B.*, Docket No. 18-1392 (issued January 15, 2019).